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REC'D TN
REGULATORY AUTH.

Guy M. Hicks
General Counsel

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March 22, 2001

OFFICE OF THE
EXECUTIVE SECRETARY
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VIA HAND DELIVERY

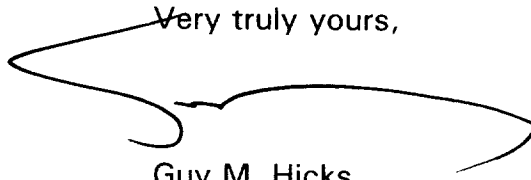
David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

RE: *Petition of Memphis Networx, LLC for Approval of a
Telecommunications Franchise with the City of Memphis*
Docket No. 01-00091

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth's Petition to Intervene. Copies of the enclosed were provided to Mr. Collier and counsel of record for all parties by facsimile yesterday afternoon.

Very truly yours,



Guy M. Hicks

GMH:ch
Enclosure

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE: *Petition of Memphis Networx, LLC for Approval of a
Telecommunications Franchise with the City of Memphis*

Docket No. 01-00091

PETITION OF BELL SOUTH TELECOMMUNICATIONS, INC.
FOR LEAVE TO INTERVENE

BellSouth Telecommunications, Inc., pursuant to T.C.A. §4-5-310 and T.C.A. §65-2-107, petitions the Tennessee Regulatory Authority (the "Authority") for leave to intervene in the above-captioned proceeding, and in support thereof states as follows:

1. Petitioner, a Georgia Corporation authorized to conduct and conducting a public utility business in the state of Tennessee, is engaged in furnishing exchange telephone service and intrastate (long distance) intraLATA telephone service in the state of Tennessee subject to the jurisdiction of the Authority and pursuant to T.C.A. §65-4-101 and T.C.A. §65-5-201, *et seq.*

2. On January 26, 2001, Memphis Networx, LLC ("Memphis Networx") submitted a franchise agreement it recently signed with the City of Memphis ("the Franchise") for approval by the Authority. Among other things, the Franchise requires Memphis Networx to (1) pay the City five percent (5%) of its gross revenues collected within the City limits and (2) provide free facilities and services

to the City. (See Sections 20 and 21 of the Franchise, a copy of which is attached as Exhibit 1.)

3. Pursuant to T.C.A. § 65-4-107, the Authority must determine whether the franchise agreement at issue “is necessary and proper for the public convenience and properly conserves the public interest.” As a matter of law, the Franchise does not conserve the public interest because it is illegal and unenforceable.

4. BellSouth acknowledges the right of Memphis Networx to negotiate a franchise agreement with the City. This Franchise, however, does not appear to be a negotiated agreement. Instead, it appears to be a product of City Ordinance No. 4404, which purports to *require* all telecommunications service providers to sign such a franchise agreement in order to provide services in the City of Memphis (“the blanket ordinance”). However, it is not permissible under either state or federal law for the City to seek to impose on telecommunications service providers a franchise agreement containing terms and conditions similar to the one signed by Memphis Networx. Moreover, in several respects, the franchise agreement appears to impinge upon the Authority’s exclusive jurisdiction to regulate telecommunications service providers at the state level.

5. As the Tennessee Court of Appeals made clear in *City of Chattanooga v. BellSouth*, 2000 WL 122199 (Tenn. Ct. App. January 26, 2000), the Legislature has not granted to municipalities in Tennessee the authority to raise

general revenue from telecommunications service providers simply because their poles and wires occupy the public rights of way. Since the City's ordinance seeks to collect five percent (5%) of a provider's gross revenue, the Franchise clearly exceeds the City's authority.

6. The *City of Chattanooga* decision also confirmed the oft-cited principle that the fee that a municipality may charge a provider is limited to an amount that fairly compensates the municipality for the cost it may incur in policing the presence of the provider in its streets. Five percent (5%) of gross revenue bears no relationship whatsoever to the City's cost of policing a telephone company's presence in the City's rights of way. Regardless of the language used in the Franchise, the 5% fee is a general revenue measure that cannot be imposed on a provider and will not withstand judicial scrutiny.

7. The Franchise is also unlawful to the extent that it seeks to condition a provider's continued presence in the rights of way upon the payment of any fee, much less a 5% fee. The Tennessee legislature has previously granted to providers the right to occupy "the streets of any village, town or city, provided that the ordinary use of such ... streets ... be not thereby obstructed." T.C.A. § 65-21-101. This grant is perpetual and cannot be abridged by the City or any other municipality in this State.

8. The many regulatory aspects of the Franchise are similarly flawed. Telecommunications services providers remain regulated at the state level by the

Authority. The State has never delegated this regulatory authority to its municipalities. In addition, §253 of the Telecommunications Act of 1996 preempts all local regulation that prohibits or has the effect of prohibiting any company's ability to provide telecommunications services. This federal prohibition would also extend to the regulatory terms and conditions in the Franchise. Finally, the regulatory aspects of the Franchise are beyond the scope of §253 of the Act and, therefore, invalid because they attempt to regulate beyond the circumscribed scope of activities related to public rights-of-way. *See, e.g., TCG New York, Inc. v. City of White Plains*, 125 F.Supp.2d 81 (S.D.N.Y. 2000).

9. To cite but a few examples, the provisions relating to preferential and discriminatory practices and service standards would appear to impose regulatory requirements in subject matter areas over which the Authority has exercised jurisdiction. (See Sections 29 and 30). Moreover, Section 28.1 of the Franchise provides eleven separate grounds upon which the City could revoke the telecommunications service provider's right to provide service to customers in Memphis. One of those grounds is the provider's failure to pay 5% of its revenues to the City, a requirement that has been struck down by the Court of Appeals in the *Chattanooga* case. (See Section 28.1(2)). The blanket ordinance upon which the Franchise is based requires that questions related to compensation from the provider to the City are subject to a mandatory dispute resolution process involving commercial (as opposed to Authority-sponsored) arbitration.

(See Section 23.3). Such regulatory provisions are not only contrary to the law if imposed on a provider, they also raise the question as to whether or not the City is attempting to exercise control over matters properly within the Authority's jurisdiction.

10. BellSouth believes that the Franchise, particularly when *imposed* on a telecommunications service provider as is done by the blanket ordinance, is clearly contrary to state and federal law. Authority approval of the Franchise may lead the City to believe that the Franchise is valid under state law and can be imposed on other telecommunications service providers. Such a result would put the Authority in the untenable position of endorsing an illegal Franchise.

11. BellSouth seeks to intervene because it provides services in Memphis and has a direct interest in any attempt by the City to impose the conditions such as those that appear in the Franchise on telecommunications companies like BellSouth.

12. Allowing BellSouth to intervene will not impair the interests of justice or the orderly and prompt conduct of these proceedings.

13. BellSouth respectfully requests that it be granted leave to intervene and participate as a party in the above-captioned proceeding.

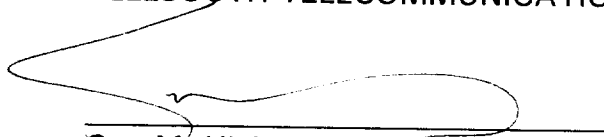
WHEREFORE, BellSouth prays:

1. That it be permitted to intervene in this proceeding and participate as a party.

2. That it have such other and further relief to which it may be entitled.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

A handwritten signature in dark ink, appearing to read "Guy M. Hicks", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2001, a copy of the foregoing document was served on the parties of record, via the method indicated:

☐ Hand
☐ Mail
☒ Facsimile
☐ Overnight

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